

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Terrorist Attacks on September 11, 2001	03 MDL 1570 (GBD)(SN) ECF Case
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This document relates to: All Cases

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' PETITION FOR A
WRIT OF HABEAS CORPUS *AD TESTIFICANDUM***

By Order dated June 10, 2019, ECF No. 4582, this Court ordered any party seeking to make an application for relief related to the deposition of six individuals currently in the custody or protection of the U.S. Government to be filed by July 1, 2019. Pursuant to that Order, Plaintiffs submit this Memorandum of Law in support of the Petition for Writ of *Habeas Corpus Ad Testificandum* for the production of Jamal al Fadl, currently in the custody and under the protection of the United States Government, to provide deposition testimony commencing on September 26, 2019 at 10 a.m., by video conference.¹

I. LEGAL STANDARD

“The authority of the court to compel the attendance of an inmate witness . . . is to be found in a conjoint reading of 28 U.S.C. § 2241(c)(5) and 28 U.S.C. § 1651(1)” through the issuance of a writ of *habeas corpus ad testificandum*. *United States v. Gotti*, 784 F. Supp. 1011, 1012 (E.D.N.Y. 1992); *Atkins v. City of New York*, 856 F. Supp. 755, 757 (E.D.N.Y. 1994). In addition to compelling production of a prisoner for a court appearance, the court may also issue a writ of *habeas corpus ad testificandum* for the purpose of taking an oral deposition. *See Calvente v. Suffolk Cnty. Corr. Facility*, No. CV 15-2024, 2017 U.S. Dist. LEXIS 75472, at *2 (E.D.N.Y. May 16, 2017) (issuing a writ to the Superintendent of the Marcy Correctional Facility to have a prisoner delivered to Sing Sing Correctional Facility to sit for a deposition); *Waste Mgmt. of La. V. River Birch*, No. 11-2405, 2017 U.S. Dist. LEXIS 58842, at *7 (E.D. La. Apr. 13, 2017) (citing *Hasso v. Retail Credit Co.*, 326 F. Supp. 1179 (D. Del. 1971)) (“The Court may also issue a Writ of *Habeas Corpus Ad Testificandum* for the purpose of taking an oral deposition.”); *In re Rothstein Rosenfeldt Adler, P.A.*, No. 11-61338, 2011 U.S. Dist. LEXIS 99651, (S.D. Fla. Sept. 6, 2011) (discussing issuance of a writ for *habeas corpus ad*

¹ Plaintiffs note that we do not necessarily need to have the location of the witness disclosed to us, as a deposition by videoconference could be conducted with the witness located in an undisclosed location.

testificandum for pretrial deposition). A writ of *habeas corpus ad testificandum* commands a prisoner's custodian to produce the witness and as such is the proper procedure here, as opposed to a subpoena, which only commands a prospective witness's attendance. *See Gotti*, 784 F. Supp. at 1012. This is also the proper procedure to invoke for third-party witnesses in witness protection. *See id.* at 1011-12.

“Whether a writ of *habeas corpus ad testificandum* is necessary is ‘committed to the sound discretion’ of the court, taking into account such factors as: ‘(i) whether the prisoner's presence will substantially further the resolution of the case; (ii) the security risks presented by the prisoner's transportation and safekeeping; and (iii) whether the suit can be stayed until the prisoner is released without prejudice to the cause asserted.’” *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 496 B.R. 713, 723 (Bankr. S.D.N.Y. 2013) (quoting *Atkins*, 856 F. Supp. at 757); *see also Gotti*, 784 F. Supp. at 1012-13 (the court may also consider “whether the presence of the prisoner will advance the disposition of the case; . . . whether the witness to be called could offer evidence that was relevant”).

II. THE COURT SHOULD EXERCISE ITS DISCRETION IN GRANTING PLAINTIFFS' PETITION FOR A WRIT OF HABEAS CORPUS AD TESTIFICANDUM

Plaintiffs seek to depose Jamal al Fadl (“Fadl”) who was an early member of al Qaeda and an associate of Osama bin Laden during the relevant time period. In the mid-1990s, Fadl defected and began assisting the U.S. Government. It is Plaintiffs' understanding that since defecting, Fadl has been under the custody and protection of the U.S. Government. By letter dated June 25, 2019, the U.S. Government neither confirmed nor denied Fadl's placement in the Witness Security Program (the “WitSec Program”). *See* Declaration of Jerry S. Goldman, dated July 1, 2019, Exhibit A, Letter from Sarah Normand to Plaintiffs' Executive Committees, dated June 25, 2019, at p. 3.

Plaintiffs anticipate Fadl will provide highly relevant testimony based on his past position within the al Qaeda organization and his involvement in its operations. Plaintiffs' counsel will work with the Government to ensure appropriate security measures are adhered to and logistical concerns are addressed.² As noted above, Plaintiffs do not need to have the location of the witness disclosed, as a deposition could be conducted by videoconference with Fadl located in an undisclosed location. Finally, because Fadl's release from the WitSec Program is not reasonably foreseeable, staying litigation until that time is impractical.

III. CONCLUSION

In light of the foregoing, Plaintiffs respectfully request that the Court issue a Writ of *Habeas Corpus Ad Testificandum* directing Donald W. Washington, head of the U.S. Marshals Service, to produce Jamal al Fadl for deposition on September 26, 2019 at 10 a.m., by video conference.

Dated: July 1, 2019

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² Plaintiffs are in the process of contacting the Attorney General's Office to help facilitate this deposition.

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